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C O N F I D E N T I A L SECTION 01 OF 02 BERLIN 001183

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TAGS: [PREL](#) [MARR](#) [MOPS](#) [PARM](#) [PGOV](#) [PHSA](#) [PBTS](#) [GM](#)

SUBJECT: BRINGING THE GERMANS AROUND ON GRANTING SOVEREIGN
IMMUNITY TO DOD-CHARTERED VESSELS

REF: 08 BERLIN 1345

Classified By: POLITICAL MINISTER COUNSELOR GEORGE GLASS. REASONS: 1.4
(B) AND (D).

11. (SBU) This is an action request. See para 10.

12. (C) SUMMARY: The German MFA and MOD continue to argue that only U.S. "warships" can be granted "sovereign immunity" against search or arrest when visiting German ports, but this seems to be based on an overly narrow and traditional reading of the UN Convention on the Law of the Sea and an incomplete knowledge of the other international conventions supporting the U.S. claim. Post recommends that we share a detailed legal analysis with the German MFA and MOD that lays out the case in favor of granting sovereign immunity to U.S.-flagged vessels on time-charter lease to the Military Sealift Command (MSC), like the MV VIRGINIAN. Post also recommends that in our next request for diplomatic clearance for such vessels, we define in the diplomatic note exactly what protections we are seeking and cite the specific conventions on which we are basing the request. END SUMMARY.

CONSULTATIONS

13. (C) U.S. Commodore James Tranoris, commander of Sealift Logistics Command Europe (SEALOGEUR), and Philip Ketner, counsel for the Military Sealift Command (EUCOM, AFRICOM, and CENTCOM), met with MFA Deputy Director General for Legal Affairs Susanne Wasum-Rainer and MOD Legal Advisor Dieter Weingaertner on September 22 in Berlin to discuss Germany's refusal to recognize the "sovereign immunity" of U.S.-flagged vessels on long-term lease to the Military Sealift Command (MSC) when they come into German ports. Wasum-Rainer and Weingaertner both reiterated Germany's well-known view (reftel) that only "warships," as defined in Article 29 of the UN Convention on Law of the Sea (UNCLOS), can enjoy such immunity. At the same time, they indicated a willingness to address practical concerns about how the leased MSC vessels are treated at German ports.

14. (C) At the invitation of the German side, Commodore Tranoris pointed out the operational impact of the German denial of sovereign immunity, while Ketner made the legal case for the U.S. position. Ketner pointed out that Article 32 of the UNCLOS appeared to put "other government ships operated for non-commercial purposes" on the same level as "warships" regarding their entitlement to "immunities." Similarly, he noted that articles 95 and 96 of the UNCLOS used the same wording in specifying that both "warships" and "ships owned or operated by a State and used only on government non-commercial service" shall on the high seas

"have complete immunity from the jurisdiction of any State other than the flag State." Ketner also noted that this type of immunity is normally extended by a state through the diplomatic clearance process to the territorial waters of that state.

15. (C) In addition, Ketner cited the 1926 Convention for the Unification of Certain Rules Concerning the Immunity of State-Owned Ships, which says that "vessels owned or operated by a State and employed exclusively...on Government and non-commercial service...shall not be subject to seizure, arrest or detention by any legal process, nor to any proceedings in rem." Ketner noted that a 1934 Protocol to the Convention had clarified that this protection applies to "ships on charter to a State, whether for time or voyage, while exclusively engaged on governmental and non-commercial service, and cargoes contained therein." From the U.S. perspective, Ketner concluded, U.S.-flagged vessels on time-charter to the Military Sealift Command (MSC) -- which are fully under U.S. military command and engaged exclusively on U.S. military business -- are clearly covered.

16. (C) Wasum-Rainer admitted that she was not familiar with the 1926 Convention and promised to review it with an open mind. She also indicated that a written legal analysis of the USG position would be helpful. She asked, however, that if it proved impossible for Germany to grant the requested "sovereign immunity" for time-charter leased vessels, whether the U.S. concerns could be met in some practical way. She noted that there was normally no reason for German customs and police officials to seek access to such ships. Under the

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NATO Status of Forces Agreement (SOFA) and Supplementary Agreement, goods they carry are not to subject to customs duties. In fact, her information was that German authorities did not routinely try to board or inspect these U.S. time-charter vessels.

17. (C) Tranoris conceded that the request for sovereign immunity was not motivated by ongoing practical problems in German ports, but pointed out that confirmation of "sovereign immunity" was necessary to guard against possible contingencies that could lead German officials to seek access to such vessels. Tranoris and Ketner also pointed out that Germany is the only country of the many nations where MSC vessels pay port calls that has explicitly declined to grant the requested sovereign immunity. They noted that because of this, SEALOGEUR has avoided German ports and routed these vessels to the Netherlands instead, moving the military cargo by rail into Germany.

18. (C) The discussion also revealed different German and American legal interpretations of the terms "warships" and "sovereign immunity." The German view is that only warships are entitled to sovereign immunity through the diplomatic clearance process via traditional MOD channels. Weingaertner explained that MOD's position is that since these time-charter vessels are not state-owned warships, they are not "sovereign" and therefore clearance of these ships into German ports falls under the jurisdiction of MFA. Ketner noted that perhaps the word "immunity" in a diplomatic note might be more effective in Germany than "sovereign immunity" as long as the request for "immunity" was specifically defined in the diplomatic clearance request and approval.

COMMENT/ACTION REQUEST

19. (C) The Germans are basing their opposition to granting sovereignty immunity on an overly narrow and traditional reading of the UNCLOS and an incomplete knowledge of the other international conventions supporting the U.S. claim, particularly the 1926 Convention on the Immunity of State-Owned Ships and the 1934 Protocol to that Convention. They also do not have a good understanding of the particular privileges that we are seeking in asking for "sovereign

immunity."

¶10. (C) We therefore recommend that a USG legal analysis be shared with the German MFA and MOD that lays out the case in favor of granting sovereign immunity for the MV VIRGINIAN and other MSC time-charter vessels. We also recommend that the next time we seek the desired immunities from German authorities, we define in a diplomatic note exactly the protections we need and cite the specific conventions on which we are basing the request.

Murphy